

St. Croix River Alewife Law & Notices of Intent to Sue Under the Clean Water Act

1. Background

There is an ongoing dispute regarding fish passage at the Grand Falls Dam on the St. Croix River in northern Maine. This dam was grandfathered under the Federal Power Act and is not subject to Clean Water Act (CWA) jurisdiction because it does not require a § 401 certification, a § 402 permit, or any other CWA authorization.

The dam has a fishway to allow fish passage upriver, but in 2008 the Maine legislature passed a law (the “Alewife Law”) ordering the fishway to be blocked during native anadromous alewife¹ migration season. The motivation for this fishway blockage is a belief (which, in the view of EPA and other state and federal fish experts, is not scientifically sound) that alewives compete with (and adversely affect) a commercially valuable (but non-native) smallmouth bass fishery above the Grand Falls Dam. The effect of the alewife blockage has been a dramatic decrease in the alewife population. Alewives are ecologically important but their numbers have declined in much of the Northeast, and based on a citizen petition the National Marine Fisheries Service must decide whether to list them as endangered by August 1, 2012.

EPA Region 1 has received two 60-day notices of intent to sue EPA under the CWA, each claiming (with slightly different arguments) that the Alewife Law is a de facto revision on Maine’s water quality standards, that EPA has a mandatory duty to review it as such, and that EPA has failed to perform this mandatory duty.² The first NOI, received in July 2011, was sent by the Conservation Law Foundation (CLF). In parallel to this NOI, the Friends of Merrymeeting Bay (FOMB), represented by Earthjustice, sued Maine in federal district court, arguing that the Alewife Law is preempted by the CWA. Both EPA and CLF decided to wait for the results of this action before taking any further steps.³ On March 15, 2012, the district court issued a decision dismissing FOMB’s complaint, rejecting its preemption argument, (b)(5). The Court stated that “[t]he Alewife Law may well effect a change in water quality standards, and this revision may trigger EPA review of the Alewife Law.... The EPA is under an obligation to review a law that changes a water quality standard regardless of whether a state presents it for review. In the event that EPA chooses not to review the Alewife Law, the Plaintiffs may sue the EPA under the citizen suit provision of the CWA.” *Friends of Merrymeeting Bay v. Olsen*, No. 11-cv-00167, Order at 16 (D. Me. 2011) (citing *Miccosukee Tribe of Indians of Fla. v. EPA*, 105 F.3d 599 (11th Cir. 1997)). On May 14, 2012, EPA received a 60-day notice from

¹ Alewives (*Alosa pseudoharengus*) and blueback herring (*Alosa aestivalis*) are collectively called “river herring.”

² The NOIs allege that EPA has been on notice of the alleged change in the State’s water quality standards since July 2010. On November 8, 2010, EPA Region 1 responded to an inquiry via email that “EPA does not view [the Alewife Law] as a water quality revision.” However, in light of the litigation initiated in federal district court in Maine, in late 2011, EPA Region 1 wrote a follow-up email indicating that the agency intended to take a “fresh look” at the question.

³ This matter has been raised in forums beyond EPA. The St. Croix River is an international river subject to the Boundary Waters Treaty and the jurisdiction of the International Joint Commission. EPA has worked with the Department of State, Department of Justice, Fish and Wildlife Service, and National Marine Fisheries Service to determine whether the IJC process may prove useful in resolving this dispute. (b)(5)

FOMB/Earthjustice.

(b)(5)

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2. Relevant Maine Legal Provisions

The free-flowing segment of the St. Croix River beginning immediately upstream of the impoundment of the Grand Falls Dam is classified as “Class A.”⁴ The Class A standards provide in relevant parts:

2. Class A waters. Class A shall be the 2nd highest classification.

A. Class A waters must be of such quality that they are suitable for the designated uses of drinking water after disinfection; fishing; agriculture; recreation in and on the water; industrial process and cooling water supply; hydroelectric power generation, except as prohibited under Title 12, section 403; navigation; and as habitat for fish and other aquatic life. The habitat must be characterized as natural.

B. The dissolved oxygen content of Class A waters shall be not less than 7 parts per million or 75% of saturation, whichever is higher. The aquatic life and bacteria content of Class A waters shall be as naturally occurs.

38 M.R.S. §§ 465(2)(A)-(B) (emphases added). Several of the terms in this definition are specifically defined:

2. As naturally occurs. “As naturally occurs” means conditions with essentially the same physical, chemical and biological characteristics as found in situations with similar habitats free of measurable effects of human activity.

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9. Natural. “Natural” means living in, or as if in, a state of nature not measurably affected by human activity.

Id. §§ 466(2), (9) (emphases added).

The Alewife Law, as amended, provides in relevant part:

This section governs the passage of river herring on ... the Grand Falls Dam located on the St. Croix River.

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⁴ 38 M.R.S. § 467(13)(A)(1). The impoundment itself is classified as “GPA.” *Id.* § 467(13)(A)(2). Class GPA waters, like Class A waters, have a designated use of “habitat for fish and other aquatic life . . . [that] must be characterized as natural.” *Id.* § 465-A(1)(A). Certain other upstream segments and/or tributaries of the St. Croix River are Class B.

2. Grand Falls Dam. The commissioner and the Commissioner of Inland Fisheries and Wildlife shall ensure that the fishway on the Grand Falls Dam is configured or operated in a manner that prevents the passage of river herring.

12 M.R.S. § 6134(2).⁵ This provision was not expressly enacted as a revision to Maine’s water quality standards, and the Maine Department of Environmental Protection (which does not view it as a revision to water quality standards) has not submitted it to EPA as such. As a practical matter, the 2008 Alewife Law is implemented by installing an impassable log in the fishway during alewife migration season.

3. Principal Arguments Raised in the NOIs Regarding the Effect of the Alewife Law on Maine’s Water Quality Standards

A. The Alewife Law effectively revises a narrative water quality criterion.

The Maine water quality standards provide that “[t]he aquatic life . . . of Class A waters shall be as naturally occurs.” 38 M.R.S. § 465(2)(B). “As naturally occurs” means conditions with essentially the same physical, chemical and biological characteristics as found in situations with similar habitats free of measurable effects of human activity. *Id.* § 466(2). This provision reads as a criterion, because it is co-located in subparagraph (2)(B) with the numeric criteria for dissolved oxygen content, as opposed to the designated uses in subparagraph (2)(A). This water quality criterion is written to apply to *the aquatic life itself* (rather than the *water quality needed to support* the aquatic life), and in this respect may be unique.

While the Alewife Law does not purport to change this criterion, CLF argues that the Alewife Law effectively revises this criterion to say, in essence, “The aquatic life . . . of Class A waters shall be as naturally occurs . . . except for the presence of river herring.”

B. The Alewife Law effectively (and improperly) creates a less-protective subcategory of designated uses and/or changes the designated use of the upstream river segment to a less protective category.

The Maine water quality standards provide that Class A waters must be “suitable . . . habitat for fish and other aquatic life,” and that, for such waters, “[t]he habitat must be characterized as natural.” 38 M.R.S. § 465(2)(A). “Natural” means living in, or as if in, a state of nature not measurably affected by human activity. *Id.* § 466(9). While the Alewife Law does not expressly purport to remove or revise this designated use, Earthjustice argues that the Alewife Law effectively creates a less-protective subcategory of Class A waters, in which the habitat is no longer “suitable” as fish habitat for all indigenous aquatic species. Similarly, CLF argues that the Alewife Law prevents the area above the Grand Falls Dam from being “natural” because – by blocking alewives from accessing 98 percent of their spawning habitat – it is now “measurably affected by human activity.”

⁵ This provision previously referred to “alewives,” but was amended on April 6, 2012 to use the more generic term “river herring,” i.e., also including bluebacks. *See* 2012 Me. Laws 598 (Apr. 6, 2012). This change is reflected in Westlaw but not Lexis or the Maine Legislature’s own web site.

CLF further argues that Maine has effectively downgraded the upstream river segment from Class A to Class B. Unlike Class A waters, for which the habit must be “natural,” for Class B waters, the Maine standards provide that the habitat “must be characterized as unimpaired.” 38 M.R.S. § 465(3)(A). “Unimpaired” means “without a diminished capacity to support aquatic life.” *Id.* § 466(11). Thus, CLF argues that, by passing legislation expressly aimed at preventing a naturally occurring species from accessing its natural habitat, the Maine legislature intentionally and effectively changed the classification for that section of the river from Class A to Class B, i.e., changed the habitat from one “living in, or as if in, a state of nature not measurably affected by human activity” to one merely “without a diminished capacity to support aquatic life.”

Native alewives in the St. Croix River watershed are an “existing use,” as they are well documented to have lived throughout the St. Croix River watershed on and after Nov. 28, 1975. Thus, if it is correct that the Alewife Law creates a subcategory or otherwise changes the designated use, the would-be plaintiffs argue that EPA cannot approve the change through a Use Attainability Analysis (UAA) because the State cannot show that attaining the designated use is not feasible (since unblocking the Dam would allow for fish passage) and because a UAA cannot remove an existing use. 40 C.F.R. §§ 131.10(g), (h)(1).

C. The Alewife Law violates Maine’s antidegradation requirements.

Maine’s antidegradation requirements, 38 M.R.S.A. § 464(4)(F)(1), provide that existing instream water uses and the level of water quality necessary to protect those existing uses must be maintained and protected. Earthjustice argues that the Alewife Law violates this provision of Maine’s water quality standards because Native alewives in the St. Croix River watershed are an existing instream use, as they are documented to have lived throughout the St. Croix River watershed on and after November 28, 1975, and the Alewife Law creates a physical barrier that prevents this existing use from being maintained.

4. Relief sought in the NOIs

Both potential plaintiffs state that, unless EPA takes immediate steps to review, and disapprove, the Alewife Law under CWA § 303(c), they intend to seek injunctive and declaratory relief, as well as a recovery of attorney fees and litigation costs.

Neither NOI suggests what, if any, water quality standard EPA should promulgate in place of the Alewife Law. As noted above, the Grand Falls Dam does not require a § 401 certification, a § 402 permit, or any other CWA authorization. It is not clear whether the relief available to the plaintiffs under CWA § 303(c) could result in the fish passage being reopened.